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DDA 76-4374

OGC 76-4156  
28 July 1976**OGC Has Reviewed**

MEMORANDUM FOR: Deputy Director for Operations

FROM:

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[REDACTED]  
Assistant General Counsel

SUBJECT: The Establishment of the Clandestine Corps

REFERENCE: Memo fm C/FR Div to DCI (via DDO), dtd 3 June 76,  
Same Subj.

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1. [REDACTED] asked that the undersigned, on behalf of OGC, review referent memorandum and provide you with an initial legal comment on subject proposal. The following are my comments and thoughts on the more important legal considerations which must be dealt with.

2. I believe we all recognize the urgent need to improve the cover and security of clandestine operations. In reviewing referent memorandum it appears that the proposal envisions a body of clandestine officers who will, for all purposes, live, work and exist almost totally cut off from Headquarters building, its support elements, the Inspector General and the General Counsel. This is to be accomplished by creating two units to administer the Corps -- a commercial cover unit physically situated outside of the Agency and an internal staff headed by an Assistant Deputy Director for Operations. Line officers of the Corps are to be administered totally by the external unit with no administrative support being given by the normal support units, such as Personnel, Security and Medical. Moreover, it appears that they would not have access to either the Inspector General or the General Counsel and vice versa.

3. It also appears that line officers of the Clandestine Corps separate into two basic classes -- "their bodies" and "our bodies." By that I mean there appears to be one category, the officers of which are not Agency employees but are gainfully employed full time by someone else. This group has at least

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two basic subcategories -- the employees of other Government agencies and the employees of private entities. They are to be, in effect, co-opted to assist the Agency, and their activities on its behalf are ancillary to their regular jobs. It is proposed to engage such people for the purposes spelled out in referent memorandum, as independent contractors of the Agency. The second basic class of people are those which would, in fact, be staff or contract employees of the Agency and thus, employees of the United States Government. Their primary activity and source of livelihood would be the Agency with their cover duties being ancillary thereto.

4. As I have previously advised [REDACTED] conceptually, the establishment of a Clandestine Corps would not be subject to legal objection. The Director clearly has the authority to create, by administrative action, those units which he deems necessary to legally pursue the responsibilities of the Agency. He does not, however, have the authority to create a separate agency. It is in the implementation of the Clandestine Corps concept that a myriad of legal authorities come into play and must be dealt with.

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5. Within the co-optee category, one legal concern involves the problem of dual compensation in violation of law for the employees of other Government agencies who are independent contractors with the Agency. Generally, it is a violation of law for an individual to receive pay from more than one Government position. 5 U.S.C. 5533. There are exceptions to this prohibition; for example, the problem might be avoided if such people could be compensated on other than a time basis. Another concern is the question of advising and securing the permission of the head of the other Government agency, or in the case of a corporation, the President or Chairman of the Board, to co-opt a specific employee for our purposes. This, in my opinion, simply must be done. Failure to do so would constitute the appearance of a violation of section 5(b)7 of Executive Order 11905 and would be in violation of the spirit and intent of section 5(f) of the Order. It would also open the door to further accusations that the Agency penetrates other Government agencies and domestic operations.

6. With respect to the second class within the Clandestine Corps, those whose primary duties are on behalf of the Agency as its employees, there are a number of legal problems which must be resolved. It must be clearly stated at this point that there is, at present, no legal way I know of to engage an officer to perform case officer functions who, having been hired by Government officers, is supervised by Government officers, and performs a Federal function, is not, in fact, a U.S. Government employee. Because of this basic legal fact, certain obligations and entitlements flow both to the

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employee and the employing agency. Among those which flow to an employee are all of the basic entitlements to pay, leave, insurance, retirement, and the normal administrative remedies which are given him by statute or regulation for purposes of seeking redress of wrongs -- erroneous overpayments, equal employment opportunity questions, personal grievances for which he has a right to go to the Director of Personnel and the Inspector General, and compensation for work-related injuries. Some of the items which flow to the employing agency, in this case CIA, are certain specific charges such as the requirement levied upon the Inspector General and the General Counsel by section 6(a) and (b) of the Executive Order to "[f]ormulate practices and procedures designed to discover and report to the Oversight Board activities that raise questions of legality or propriety." In addition, the head of the agency is charged by the Executive Order to "[e]nsure that Inspectors General and General Counsels...have access to any information necessary to perform their duties...." The point of this is that completely cutting off a group of U.S. Government employees from normal Agency administration raises a host of problems and it would seem, blocks the Director, the Inspector General and the General Counsel from carrying out their assigned duties under the Executive Order. In addition to this basic legal consideration, having these people administered totally outside of the Agency by a small unit within the Operations Directorate raises a number of questions concerning the assigned regulatory responsibilities of certain Agency officers. For example, all employees of the Agency are required to be cleared for classified information following the completion of a security background investigation by the Office of Security. In addition, the Office of Medical Services is responsible for certifying employees for purposes of entrance on duty and overseas assignment. The Office of General Counsel is responsible for liaison with the courts and as you know, deals almost on a daily basis with judges around the country for purposes of excusing covert employees from jury duty and briefing judges and lawyers when a covert employee is involved in a personal legal matter. Were the Director to approve the proposal as written, he would be very close to establishing a second agency concept, as previously mentioned, subject to almost none of the statutory and regulatory controls which serve as administrative checks and balances and thus, ensure the legal functioning of the Agency. Whatever its eventual configuration, the Clandestine Corps' project simply cannot diminish the effectiveness of those controls.

7. A careful review of the paper proposing the establishment of the Clandestine Corps causes one to conclude that the true purpose of the proposal is not to hide the members of the Corps from opposition services, but rather to hide the identities of members of the Corps from the rest of the Agency. I am cognizant, of course, of the fact that this may not be altogether bad in view

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of the [REDACTED] Marchetti and, particularly, the Agee disclosures, but the legal obstacles in this regard are formidable and the same solution may be achieved in a much simpler manner. Instead of creating the rather elaborate structure which is envisioned within the proposal, the same effect might be achieved by having a handful of officers, whether inside or outside of Headquarters, who deal directly with members of the Clandestine Corps and a small staff within Headquarters to handle their administration. The DDO could then take a page from the book of the DDS&T and establish a special compartmented clearance which would not have to include more than 20 or 25 Agency officers from those offices which have to deal with the Clandestine Corps officers' career and administrative problems. Strict instructions might be passed by the Director of Central Intelligence to those few officers who receive the Clandestine Corps compartmented clearance concerning the extreme sensitivity of the project and the security requirement not to discuss either the project, its activities or the nature of the problems within it to any person not known to have the clearance. The few DDC officers inside the Agency who have the responsibility for administering Corps members could call together those administrative people who hold the clearance for purposes of planning and resolving problems. In this regard administrative officers who are to deal with these problems, with two possible exceptions, do not need to know the identity of the Corps member or members being discussed. Numbers or pseudonyms could be used for identification purposes and all files, records, memoranda, etc., would be kept by the inside Corps unit. The two possible exceptions are, it would seem, a designated officer from the Office of Security and a doctor from the Office of Medical Services.

8. What I am suggesting here to solve your problem in a much less objectionable manner from a legal standpoint, is a team of inside officers from the administrative and legal field who would be provided these clearances and vested with the trust and authority of their respective offices to act on its behalf. They would come together at the call of the inside Clandestine Corps unit to deal with the ongoing problems that arise. An effort in this direction would ease most of the legal objections and would seem to accomplish the desired end. Any such effort, however, must still be effected within the boundaries of the administrative controls mentioned at the end of paragraph 6.

9. It would be essential for either the inside or outside Corps unit to keep copious records that they could check on behalf of the administrative people in response to proper legal inquiry. For example, the Director is often required, in response to subpoena or valid court inquiry, to certify that a certain named individual is neither an employee of, nor in any manner officially associated with, the Central Intelligence Agency. Without recourse to Corps files, administrative officers could not in good conscience permit the Director to swear to such a statement when the same might, in fact, be false.

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11. Finally, I offer the following thoughts on the memorandum. In general, the impression given by the memorandum is not good. It appears to be rather superficial and this reflects adversely on the proposal. Specific criticism of areas that need to be corrected or expanded is as follows:

Paragraphs I and II - In neither paragraph is the Director given a clear picture of what the Corps is supposed to be and whether all of its officers are to be nonofficial cover, official cover, or both.

Paragraph VI la - It is unclear here what is meant by "trustee level." Senior corporation people are usually officers or directors, not trustees.

Paragraph VII A3 - There is presently no legal authority for such expenditure and for the Director to create one would require recourse to the Commissioner of IRS. Otherwise, the allowances provided would be taxable income to the employee.

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Paragraph VII G - I have already mentioned the problem of medically certifying an employee for duty and overseas in a previous paragraph.

Paragraph VII J1 - There appears to be an error here in the number of the Executive Order. It is presumed it should be 11652, not 11905.

12. In conclusion, I am most sympathetic to the need for a truly covert capability and I am of the opinion that the legal problems of establishing one are difficult but not insurmountable. However, the approach suggested in referent memorandum seems to envision little more than an escape from certain legal and administrative structures. In my view, this is the wrong foot to start off on. A better approach, it would seem, would be to work through the Director and a select, compartmentedly cleared group of administrative, medical and legal people to tailor your program so that it will not be subject to legal objection.

13. I would be happy to discuss these thoughts and legal problems with you at your convenience.



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